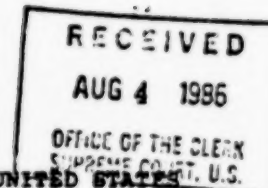


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NO. 85-2099

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA,  
Petitioner

v.

DOROTHY PINLEY,  
Respondent

---

RESPONDENT'S REPLY BRIEF TO  
THE PETITION FOR WRIT OF CERTIORARI  
TO THE SUPERIOR COURT OF PENNSYLVANIA

---

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COMMONWEALTH OF PENNSYLVANIA,  
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DOROTHY FINLEY,  
Respondent

**RESPONDENT'S REPLY BRIEF TO  
THE PETITION FOR WRIT OF CERTIORARI  
TO THE SUPERIOR COURT OF PENNSYLVANIA**

Respondent, Dorothy Finley, by her court-appointed counsel, Catherine M. Harper, Esquire, of the law firm of Hamburg, Rubin, Mullin and Maxwell, respectfully submits this Reply Brief in accordance with Rule 22 of the United States Supreme Court Rules, in response to the Petition for Writ of Certiorari sought by the Commonwealth of Pennsylvania at the above-captioned court term and number.

Your Respondent respectfully urges this Court to refuse the Writ of Certiorari because the Pennsylvania courts have

correctly held that where counsel is court-appointed for an indigent criminal defendant, pursuant to the mandates of the applicable state statutes and criminal rules, and that counsel thereafter seeks to withdraw from representing the indigent criminal defendant, counsel must follow the procedures outlined in Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967) Rehearing Denied, 388 U.S. 924, 18 L. Ed. 2d 1377, 87 S. Ct. 2094, and further, that the Pennsylvania courts correctly determined that the procedure suggested as an alternative by the Philadelphia Court of Common Pleas, in requiring the court-appointed counsel to brief the case against his client, not only fails to comport with Anders v. California, but, more importantly, offends traditional notions of due process and equal protection before the Law.

#### COUNTERSTATEMENT OF THE CASE

This matter comes before the Court on a Petition for Writ of Certiorari by the Commonwealth of Pennsylvania, after the Pennsylvania Supreme Court, the highest court in the Commonwealth of Pennsylvania, dismissed the Commonwealth's prior appeal as "having been improvidently granted," and reinstated the able and well reasoned Opinion and Order of the Pennsylvania Superior Court. Commonwealth v. Finley, 330 Pa. Super. Ct. 313, 479 A.2d 568 (1984), app. dismd. 507 A.2d 822 (Pa. 1986).

The Pennsylvania Supreme Court's Order was per curiam and was issued after the matter had been fully briefed and argued before the Court on October 23, 1985.

The previous Pennsylvania Superior Court Opinion held that the procedure utilized by counsel in attempting to withdraw from representation of the

indigent criminal defendant had resulted in ineffective assistance of counsel, because instead of following the procedures outlined in Anders v. California, supra, court-appointed counsel had chosen instead to outline for the Court the reasons why a Post-Conviction Hearing Act Petition would be meritless. The Court found this procedure defective and ordered that the case be remanded for subsequent counsel to represent Dorothy Finley in the filing of an Amended Petition under the Post-Conviction Hearing Act (Commonwealth v. Finley, 330 Pa. Super. 313, 479 A.2d 568 (1984)). (Commonwealth Appendix at 2B-19B).

Dorothy Finley's underlying conviction resulted from a non-jury trial on October 17, 1975, when she was convicted of robbery, carrying firearms without a license in a vehicle, possessing instruments of crime generally, and prohibited offensive weapons, criminal conspiracy and

murder in the second degree. On the murder charge, she was sentenced to life imprisonment; various sentences were meted out with respect to the other charges. She has been incarcerated at the State Correctional Institution for Women at Muncy in Pennsylvania, since 1975.

Mrs. Finley was represented at trial by a court-appointed attorney who also took the direct Appeal from her convictions to the Pennsylvania Supreme Court, where all of the sentences and convictions were affirmed in a per curiam opinion approximately one page in length at Commonwealth of Pennsylvania v. Dorothy Finley, 477 Pa. 211, 383 A.2d 898 (1978).

According to the Opinion, two issues only had been raised on Mrs. Finley's behalf: (1) there was allegedly insufficient evidence to support any of the convictions for the crimes charged, and (2) a search warrant was based on illegally obtained evidence and therefore, the



evidence obtained pursuant to that warrant was inadmissible. Having identified those issues, the Supreme Court concluded: "Having found no merit in either of these arguments, we affirm the judgments of sentence." Thereafter, Mrs. Finley filed a pro se Petition for Relief under the Pennsylvania Post-Conviction Hearing Act, 42 Pa. C.S.A. § 9541 et seq. [Previously 19 P.S. 1180-1 et seq.] Her uncounseled Petition merely repeated the allegations raised by her trial counsel in a direct appeal to the Supreme Court. Nevertheless, although Mrs. Finley averred that she was indigent and requested the appointment of counsel, the PCHA Petition was denied by the Court without a hearing and without the appointment of counsel. The Court found that: "The allegations raised in the instant petition must be deemed to have been fully litigated." Later, the Pennsylvania Supreme Court reversed that determination, vacated the Order denying

relief, and remanded the case to the PCHA court with instructions that counsel be appointed for Mrs. Finley. Commonwealth v. Dorothy Finley, 497 Pa. 332, 440 A.2d 1183 (1981), reargument denied. The Pennsylvania Supreme Court determined: "An indigent petitioner has the right to assistance of counsel with his first PCHA petition." The ruling rests on both the Post-Conviction Hearing Act, and the Pennsylvania Rules of Criminal Procedure. The Pennsylvania Supreme Court sagely noted that: "Counsel for a PCHA [Post-Conviction Hearing Act] petitioner can more ably explore legal grounds for complaint, investigate underlying facts, articulate claims for relief, and promote efficient administration of justice." Commonwealth v. Finley, Id. at 335.

Thereafter, in compliance with the Order of the Pennsylvania Supreme Court, counsel was appointed for Mrs. Finley on her PCHA Petition. However, that court-

appointed attorney did not fulfill the role envisioned for him by the Pennsylvania Supreme Court in remanding the case. The attorney did not file an Amended PCHA Petition, and he did not file a Brief in support of the issues raised in the uncounseled PCHA Petition, or on any other issues. Instead, Mrs. Finley's court-appointed counsel "concluded that no arguably meritorious issues existed" and "sought advice from [the PCHA] court". (See the Opinion and Order of the Honorable Edward J. Blake, dated February 22, 1983, found at page 1C of the Commonwealth's appendix).

The PCHA Court thereafter instructed court-appointed counsel that he might withdraw his appearance if he followed the following procedure, ultimately found defective by the Pennsylvania Superior Court:

Counsel was instructed that where he had completed a comprehensive review of the entire record and the applicable law, and has

interviewed the defendant and concluded that the record was devoid of arguably meritorious contentions, counsel should write this court in letter form detailing not only the nature and extent of his review, but also listing each issue the defendant herself wished to have raised, followed by an explanation why those issues were meritless. At that point, this Court would conduct its own independent review and, if our conclusions coincide with counsel's, the Petition would be dismissed without a hearing and defendant would be apprised of her appellate rights.

Blake Opinion at Commonwealth Appendix 8C.

PCHA counsel followed the procedure suggested to him by the Court, instead of the procedure outlined in Anders v. California, supra, and wrote a letter to the Court "explaining" why Mrs. Finley's PCHA Petition would be "meritless". Not surprisingly, the PCHA Court dismissed her Petition without a hearing and he was relieved of his appointment. Counsel never wrote a Brief setting forth issues of arguable merit, and, apparently, never notified the indigent criminal defendant of

his intentions or of her rights to proceed pro se or to obtain new counsel. After the Court dismissed the Petition without a hearing, undersigned counsel was appointed to pursue an appeal to the Pennsylvania Superior Court.

Pennsylvania Superior Court concluded that the procedure suggested by the PCHA Court, and followed by the PCHA court-appointed attorney, was defective because it had the effect of depriving Mrs. Finley of her right to adequate representation on her PCHA Petition. (See Pennsylvania Superior Court Opinion reproduced at Commonwealth's Appendix at 2B et seq., 19B).

The Pennsylvania Superior Court issued its Opinion at Commonwealth v. Dorothy Finley, 330 Pa. Super. 313, 479 A.2d 568 (1984) (reproduced in the Commonwealth's Appendix at 2B-19B).

The Opinion of the Pennsylvania Superior Court first notes that the

requirements outlined by this Court in Anders v. California, supra, are applicable to the instant case where counsel appointed to represent an indigent defendant in a collateral review proceeding wishes to withdraw from the case on the ground that an appeal would be frivolous. The Court also traced the history of the progeny of Anders v. California in the Pennsylvania courts, and noted that Anders has been applied to direct appeal requirements, and thereafter concluded that it should also apply to indigent criminal defendant's first appeal under the Post-Conviction Hearing Act, a collateral review statute. Key to the Superior Court's reasoning in this case was the prior decision by the Pennsylvania Supreme Court that Dorothy Finley was entitled to court-appointed counsel on her first Post-Conviction Hearing Act Petition. The Superior Court astutely noted: "The Supreme Court wished to afford appellant the opportunity to



amass other issues with arguable merit. . . Moreover, Pennsylvania Rule of Criminal Procedure 1504, in affording counsel, means that counsel should act as an advocate in fulfilling his role." (Pennsylvania Superior Court Opinion reproduced in the Commonwealth's Appendix at 13B.) The Court declined to make its own exhaustive search of the record without benefit of an advocate's brief, because the Supreme Court had mandated that counsel be appointed to assist Dorothy Finley in her PCHA Petition. "This remand carries with it a strengthening obligation to assess the quality of appellant's case in an arena wherein she is accompanied by a zealous advocate." (Pennsylvania Superior Court Opinion at 16B.)

Therefore, the Court concluded that the procedure followed by PCHA counsel was defective in that counsel's chosen course of a "no merit letter" was insufficient in light of the fact that there appeared, to

the Pennsylvania Superior Court, to be arguably meritorious issues, and the court-appointed counsel's review of the record was not evident. The Court also noted that court-appointed counsel had failed to comply with the Anders requirement that the indigent herself be informed of counsel's decision, and that she be given the opportunity to proceed pro se. For those reasons, the Pennsylvania Superior Court endorsed the view that counsel seeking to withdraw from a court appointment represent an indigent criminal defendant on a Post-Conviction Hearing Act Petition must comply with the requirements of Anders v. California, that were restated by the Court as follows:

If the attorney, after a conscientious evaluation of the record, finds his case to be 'wholly frivolous', he may so advise the court and request permission to withdraw. He must, however, accompany his request with a brief referring to anything in the record which will 'arguably' support an appeal. A copy of that brief should then be furnished to the indigent within

enough time to allow the latter to pursue an appeal, either counseled or pro se. The court (emphasis in original) after a full examination of the record then decides whether the case is wholly frivolous; and if it so finds, it may grant counsel's request to withdraw.

(Pennsylvania Superior Court Opinion at 7B-8B).

Thus, the Pennsylvania Superior Court remanded the case to the Court of Common Pleas for Philadelphia County with the directive that Finley be permitted to file a counseled amended PCHA Petition.

Thereafter, the Commonwealth sought review of the Superior Court decision in the Pennsylvania Supreme Court by allocatur. Allocatur was granted, and the matter was briefed and argued before the Pennsylvania Supreme Court. On April 23, 1986, in a Per Curiam Opinion, the Pennsylvania Supreme Court simply ordered that the Appeal be dismissed "as having been improvidently granted." (Appendix at 1A-2A), but the Commonwealth once again

declined to follow the directive of the Superior Court and now seeks review by this Court of the Superior Court's Order applying the requirements of Anders v. California to counsel who seeks to withdraw from representation of an indigent criminal defendant on her first Post-Conviction Hearing Act Petition.

ARGUMENT

- A. THE COMMONWEALTH'S PETITION IS WITHOUT MERIT BECAUSE THE PENNSYLVANIA COURTS CORRECTLY DETERMINED THAT COURT-APPOINTED COUNSEL MUST FOLLOW THE DICTATES OF ANDERS V. CALIFORNIA, 386 U.S. 738 (1967) IN SEEKING TO WITHDRAW FROM THE REPRESENTATION OF AN INDIGENT IN HER FIRST PETITION UNDER THE PENNSYLVANIA POST-CONVICTION HEARING ACT WHERE STATE LAW REQUIRES COUNSEL BE PROVIDED.

The Commonwealth of Pennsylvania provides criminal defendants with a right of collateral review under the Post-Conviction Hearing Act, 42 Pa. C.S.A. § 9541 et seq., Public Law, 417, May 13, 1982 (hereinafter "PCHA"). Indigent petitioners under the Post-Conviction Hearing Act, are entitled to the appointment of counsel on their first PCHA petition under § 9551 of the Act.<sup>1</sup> The

<sup>1</sup> 42 Pa. C.S.A. § 9551(b) Appointment of Counsel: "If the petitioner is without counsel and alleges he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested and the court is of the opinion that a hearing on the petition is required, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel. The appointment

Pennsylvania Rules of Criminal Procedure similarly provide for the appointment of counsel for PCHA petitions under Pennsylvania Rule of Criminal Procedure 1503(a).<sup>2</sup>

The Pennsylvania courts have interpreted the Post-Conviction Hearing Act (and its predecessor now repealed and once found at 19 Purdon's Statute § 1180-1, Public Law 1580, January 25, 1966) as

of counsel shall not be required if petitioner's claim is patently frivolous and without trace of support in the record as provided by § 9549 (relating to hearing on petition)."

<sup>2</sup> Rule 1503(a): "Except as provided in Rule 1504, when an unrepresented petitioner satisfies the court that he is unable to procure counsel, the court shall appoint counsel to represent him. The court, on its own motion, shall appoint counsel to represent a petitioner whenever the interests of justice require it." Rule 1504 provides that the appointment of counsel is not necessary "when a previous petition involving the same issue or issues has been finally determined adversely to the petitioner and he was either afforded the opportunity to have counsel appointed or was represented by counsel in proceedings thereon."

requiring counsel on a first PCHA petition. Commonwealth v. McClinton, 488 Pa. 598, 413 A.2d 386 (1980). The requirement that counsel be appointed to represent the indigent on his first PCHA petition is applied even where the petition (generally drawn pro se) fails to raise new issues, because "counsel for PCHA petitioner can more ably explore legal grounds for a complaint, investigate underlying facts, articulate claims for relief and promote efficient administration of justice." Commonwealth v. Finley, 497 Pa. 332, 440 A.2d 1183 (1981). See also Commonwealth v. McClinton, supra, and cases cited therein.<sup>3</sup>

Pennsylvania's requirement that counsel be appointed on a first PCHA petition is, of course, a requirement that

<sup>3</sup> Commonwealth v. Blair, 460 Pa. 31, 331 A.2d 213 (1975); Commonwealth v. Mitchell, 427 Pa. 395, 235 A.2d 148 (1967); Commonwealth v. Richardson, 426 Pa. 419, 233 A.2d 183 (1967); Commonwealth v. Hoffman, 426 Pa. 226, 232 A.2d 623 (1967); and Commonwealth v. Fiero, 462 Pa. 409, 341 A.2d 448 (1975).

counsel so appointed shall have the opportunity to and shall, in fact, adequately discharge the responsibilities required by his representation. Commonwealth v. Ollie, 304 Pa. Super. 505, 450 A.2d 1026 (1982). Therefore, where counsel fails to file an amended PCHA petition (the first having been filed pro se), fails to file a brief, fails to seek an extension of time, and fails to seek a hearing, courts have held that the petition was in actuality "uncounseled," and have determined that new counsel should be afforded the petitioner. Commonwealth v. Ollie, supra, at 510.

Since an indigent's right to counsel on her first PCHA petition is a right afforded by the Pennsylvania courts under Pennsylvania statutes, and Pennsylvania Rules of Criminal Procedure, it is reasonable for the courts of the Commonwealth to determine that counsel seeking to withdraw from representation in



such a case must follow the dictates of Anders v. California, 386 U.S. 738 (1967), even if the requirement to counsel in this instance were ultimately found not to be required by the United States Constitution.

Moreover, once counsel has been appointed, there is no logical reason to distinguish between the proper procedures to be followed when counsel seeks to withdraw from representation in a direct appeal case, and when counsel seeks to withdraw from representation in a collateral review case. If a petitioner has the right to counsel at all, that right must carry with it the right to effective counsel, and following proper procedures in order to withdraw is an essential component of effective representation. Anders v. California, *supra*, has been the rule in Pennsylvania for counsel seeking to withdraw from the representation of an indigent since Commonwealth v. Baker, 429 Pa. 209, 239 A.2d 201 (1968). The court

wholeheartedly adopted the procedure set out in Anders v. California, noting:

The Supreme Court of the United States has recognized in Anders that even the most diligent court-appointed counsel may sometimes justifiably believe that he is being asked to pursue an appeal totally devoid of merit. However, because it is also fundamental to the notion of equal justice for all that the indigent defendant receive just as spirited a defense as the man that can retain private counsel, the Supreme Court has set forth very strict standards, now applicable to the states, which counsel and the appellate court must follow before an attorney may be permitted to withdraw his services. *Id.* at 211.

Sound jurisprudence requires that once a right to counsel is recognized, that the case of Anders v. California provides the only acceptable method by which counsel might withdraw from his representation of the indigent. This Court has so decided, and the Pennsylvania courts were wholly correct in determining that the requirements of Anders v. California must be applied to the situation in the case at bar, where a court-appointed attorney seeks



to withdraw from representation of an indigent on a petition for review under the Pennsylvania Post-Conviction Hearing Act, once counsel has been deemed a necessity by the Pennsylvania courts.

B. THE COMMONWEALTH'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE PENNSYLVANIA COURTS CORRECTLY DETERMINED THAT THE PROCEDURE FOLLOWED IN THE CASE AT BAR BY COURT-APPOINTED COUNSEL SEEKING TO WITHDRAW FROM REPRESENTING AN INDIGENT, WAS DEFECTIVE AND OFFENDS TRADITIONAL NOTIONS OF DUE PROCESS AND EQUAL PROTECTION.

As the above concludes, the Pennsylvania courts correctly determined that the requirements of Anders v. California should be followed by a court-appointed attorney who seeks leave to withdraw from representing an indigent on her petition for review under the Post-Conviction Hearing Act. In the instant matter, not only did the attorney fail to follow the dictates of Anders v. California, he unfortunately transgressed notions of due process and equal protection

of the laws and fairness to indigent criminal defendants in following the route suggested by the Honorable Edward J. Blake of the Court of Common Pleas of Philadelphia, sitting as Post-Conviction Hearing Act Judge. The procedure suggested by the PCHA court in the instant matter, is outlined above at page 8. Briefly, it was found defective under the requirements of Anders v. California, *supra*, by the Pennsylvania Superior Court, because court-appointed counsel simply failed to comply with the requirements of Anders in that he (1) failed to file a petition for leave to withdraw stating that he has found the appeal to be frivolous; (2) failed to file a proper Anders brief referring to anything in the record that might arguably support the appeal, and instead, briefed the case against his client with a "no merit letter," and failed to furnish the indigent herself with a copy of an Anders brief and withdrawal petition to give the indigent a

chance to retain new counsel or raise issues on her own behalf before the court.

Under the circumstances, the Pennsylvania Superior Court felt that Dorothy Finley had been denied effective assistance of counsel in connection with the litigation of her petition under the Post-Conviction Hearing Act, and remanded the case for an evidentiary hearing on the claims raised in appellate counsel's brief, and "any other issues discerned by counsel after an exhaustive search of the record in accordance with his opinion."

The procedure followed in the case at bar was defective not only because it failed to live up to the requirements of Anders v. California, supra, but also because it affirmatively required court-appointed counsel to brief the case against his client, and forced the court to determine the merits of the petition without benefit of an advocate's brief or an advocate's review of the record in

determining the issues. The procedure followed by the Philadelphia PCHA court in this case ill serves the indigent criminal defendant, and ill serves the efficient administration of justice.

The procedure followed in the case at bar, like that followed in Anders v. California, supra, forces the court to make an independent review of the record, without the assistance of an advocate's brief or an advocate's review of the record or an advocate's marshalling of the facts, and nevertheless to pass judgment on the merits. As this court correctly noted in Anders v. California, supra:

The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client, as opposed to that of amicus curiae. The no merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can, with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to

the best of his ability. Id. at 744.

Although the Anders case applied to a counseled direct appeal, there is simply no reason to eschew it in a collateral review proceeding, where the Pennsylvania courts have determined that the petitioner is entitled to the assistance of counsel. The reasons for requiring an exhaustive review of the record, an Anders brief, and a separate petition to withdraw, with notice to the indigent, are no less compelling in the Post-Conviction Hearing Act process than they are in a direct appeal.

Thus, where a state grants to a criminal defendant the right to effective representation on his first petition under a state statutory collateral review scheme, and the petitioner is thereafter denied the effective representation of counsel (as Dorothy Finley was in this case), the result is constitutionally infirm. See, Evitts v. Lucey, 83 L. Ed. 2d 821, 53 U.S.

L.W. 4101, 105 S. Ct. 830 (1985). See also Ross v. Moffitt, 417 U.S. 600 (1974): "we do not mean by this opinion to in any way discourage those states which have, as a matter of legislative choice, made counsel available to convicted defendants at stages of judicial review. . . . Our reading of the Fourteenth Amendment leaves these choices to the State. . . ." Id. at 618-619.


The exploration of the legal grounds for the petition, investigation of the underlying facts, and formulation of an articulate statement of the claims are functions of an advocate, and would be inappropriate for the judge or his staff. The procedure followed in the case at bar is defective since it lacks the requirements found necessary in Anders v. California, supra, and because it required counsel to affirmatively brief the case against his client, and therefore neither promotes the efficient administration of justice, nor secures to the indigent her

rights under the due process and equal  
protection clauses of the Constitution of  
the United States of America.

CONCLUSION

For the above-stated reasons, it is  
respectfully submitted that the Petition  
for Writ of Certiorari be denied and the  
case remanded in accordance with the  
Opinion and Order of the Pennsylvania  
Superior Court.

Respectfully submitted,  
HAMBURG, RUBIN, MULLIN &  
MAXWELL

By:   
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